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THE RIGHT OF ASSOCIATION

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The American people are chronic joiners. We join churches, garden clubs, literary societies, reform leagues, political parties, unions, social clubs and secret lodges. Those of us who cannot find an association whose members or purposes appeal to us, or vice versa, as often as not originate a new association to add to the ever-growing list of thousands already in existence. If all the Knights of various degrees and fealties in the United States were to sally forth to do battle in a modern religious war, the earlier Crusades by comparison would have been minor skirmishes. He is a rare individual who is not a member of from two to a dozen clubs, societies, orders and associations. In fact, the multiplicity of organizational affiliations of the average American, and the corresponding demands on his time and energy, would lead to the prediction that before many more decades have passed he will be turning in despair to yet another one — Associates Anonymous — to effect a cure.

In *The Great American Band-Wagon,* Charles Merz points to the American penchant for joining secret societies:

> . . . Into a nation overrun with secret fraternal orders come each year new secret fraternal orders which somehow live and prosper. Mere fear of crowding does not faze them. The Elks are followed by the Moose, the Moose are followed by the Stags, the Stags are followed by the Buffalos, the Buffalos are followed by the Deer, the Deer are followed by the Reindeer; it is almost demonstrably true, and not a mere conceit of the imagination, that within a decade we shall have the Caribou and then the Musk-Ox.
>
> Each year the procession lengthens. The apparent fact that this America of ours is already super-organized with bucks and birds and knights and seers is only an incentive. On they come: new orders stumbling over themselves into a world in which there is ostensibly not the slightest room for them, yet finding room and settling down and waxing great and adding millions to their rosters. We have reached a stage, in point of numbers, when half the adult population of America now owns a fez, a

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scimitar, a secret code, two feet of plume, a cutlass or a pair of Anatolian breeches.[1]

Whether this American propensity for joining is explained by the herd instinct, or the natural gregariousness of Americans, or the desire to "belong", or the desire to expand business contacts, or the urge to participate in a group insurance plan, or a combination of these, the fact remains that we like to associate ourselves with others in various organizations. Turning aside from the lighter approach of Merz, serious probers into this phenomenon have noted that it is a reflection of some basic features of American political theory and has offered a positive contribution in the American democratic society. Arthur Schlesinger states:

> At first thought it seems paradoxical that a country famed for being individualistic should provide the world's greatest example of joiners . . . . To Americans individualism has meant, not the individual's independence of other individuals, but his and their freedom from governmental restraint. Traditionally, the people have tended to minimize collective organization as represented by the state while exercising the largest possible liberty in forming their own voluntary organizations. This conception of a political authority too weak to interfere with men's ordinary pursuits actually created the necessity for self-constituted associations to do things beyond the capacity of a single person, and by reverse effect the success of such endeavors proved a continuing argument against the growth of stronger government.[2]

Whether or not freedom of association is encompassed by freedom of assembly, it is at least a right cognate to the latter. And its importance in a democratic society cannot be overestimated. Writing in the 1830's, Alexis de Tocqueville stated:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalien-

1. Charles Merz, THE GREAT AMERICAN BAND-WAGON, pp. 27-28 (New York, 1928).

2. Arthur M. Schlesinger, "Biography of a Nation of Joiners," 50 AM. HIST. REV. 1 (1944).

able its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.[3]

The United States Supreme Court has not yet accorded the right of association the general protection of the First Amendment rights. But in a concurring opinion in 1952 on the validity of the State of Oklahoma's version of the loyalty oath, Justice Frankfurter stated:

> . . . [T]o require such an oath, on pain of a teacher's loss of his position in case of refusal to take the oath, penalizes a teacher for exercising a right of association peculiarly characteristic of our people . . . . Such joining is an exercise of the rights of free speech and free inquiry. By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling.[4]

As to the origins of the associative urge in America, Arthur Schlesinger states:

> . . . [T]he colonial era saw the emergence of what was to become a dominant American trait. Prompted originally by a passion for liberty of worship, and for a long time going no further, the associative impulse began to invade more mundane undertakings as the break with England approached. Though it achieved decisive results only in the realm of public affairs, the foundations were laid for future progress in other respects as well. National independence hastened these tendencies. The philosophy of natural rights underlying the Revolution exalted the individual's capacity to act for himself; the military struggle taught men from different sections valuable lessons in practical co-operation; the mounting sense of national consciousness suggested new vistas of achievement; and Britain was powerless to interpose a restraining hand. A little later, after a decade of political instability, the adoption of the Constitution stimulated still further applications of the collective principle.[5]

In the economic sector more voluntary associations arose. This was particularly evident in the period immediately following the ratification of the Constitution, when canals, bridges, and roads were

3. Alexis de Tocqueville, DEMOCRACY IN AMERICA, Vol. I, p. 196 (New York, 1945).
4. Wieman v. Updegraff, 344 U. S. 183, 195 (1952).
5. Schlesinger, *op. cit.*, p. 5.

built by private enterprise, and the corporate device grew out of the earlier looser associations.

In spite of the perturbation of Madison over the evils of faction, the separation of powers in the Constitution was itself a contributing factor to the growth of the largest factions in the United States — political parties. The need for a harmonizing element to bridge the gap between legislative and executive branches was at least partly a factor in the rise of political parties.

Literary societies and social clubs grew as the frontier advanced westward, permitting more leisurely occupations in the east. In the 1820's the associative urge of religious groups focussed on humanitarian societies for the abolition of slavery or war or strong drink, or the reform of women of doubtful virtue.

After the Civil War, the rise of large cities and the improvements in communication lent added impetus to the growth of associations, and from then to the present time the number and purposes of such associations have steadily increased. The farmers joined together to battle the business men. Laborers united to employ concerted pressure for better wages and working conditions. Business men merged to form mammoth trusts and combines. Professional men and scholars formed their associations. And in the avocational field the secret fraternal societies came into their own, with more than five million members in over 70,000 local lodges by the end of the 19th century.

Of what value are these myriad associations in a democratic society? Is their usefulness merely in a harmless outlet for unspent energy, or is there a more vital purpose served? If the former, then legal restrictions on their activities might result in individual inconvenience or annoyance, but would not necessarily be occasion for alarm. If the various associations represent a positive force for making a democratic society function properly, however, then such restrictions should be examined closely in order to determine whether this typical American institution itself is in danger of being so fettered as to fail in its contribution.

In every association there is, in varying degrees, some inquiry, some discussion, and some interchange of ideas and opinions. Unless the purposes of the association are patently illegal or improper, participation in these activities is of obvious value in a democracy. It might be difficult to ascertain the positive contribution in this context of discussions on the care and growth of roses by a group of amateur horticulturists. But no matter what the subject of discussion, there is apt to be gleaned a residue of training and experience

in the give and take of ideas and opinions which can be translated usefully into the arena of conflict between views on the larger problems of humanity. Techniques acquired in the examination of even the most mundane problems might very well prove valuable in reaching conclusions on the more serious questions of life. In addition there is the important training in organization, management, and group action in accordance with the will of the majority.

The criticism is sometimes made that in the American practice of joining associations there results the submersion of individuality into group ideas, group thinking and group personality. But union does not necessarily mean uniformity. It is indeed the supreme value of associational behavior that it can lead ultimately to the most productive and worthwhile type of individualism — that fulfillment of individual personality and capacity which includes recognition of individual responsibility within the social environment.

The novice joiner is quite apt to follow the pattern of thought and action set by the group "leader" in his eagerness to reach full acceptance into the group. Nowhere is this habit more in evidence than in the various adolescent clubs, fraternities and sororities. High school club members feel that they must adopt the same clichés, the same dress, the same prejudices and the same enthusiasms as the other members — the style being set by the club leader or leaders. These, however, are the associations of novices. With age, these super-conformists realize that membership in mimicry is unsatisfactory. The pendulum is then apt to swing to the opposite extreme, with the next stage of associational behavior being one of chronic dissent. The urge for recognition as an individualist is expressed in criticism and opposition to the group program. With maturity comes the realization that perennial opposition is not the most fruitful role of the individual in an association; nor is it the role most likely to win for its possessor the respect of his associates. The octogenarian who stated that he had seen many changes in his lifetime and had been " 'agin' every one of them" might be considered an individualist by some, but his philosophy does not offer any positive force for advancing civilization or human relationships. It is the most important contribution of activity within lawful associations that it can bring to the individual the realization that he only attains real individualism in societal living when he can bring to bear his own unique physical and mental equipment as a positive force for the solution of the group problems. And as the novice joiner becomes educated in the associational process within the less important

groups, he is free to move into other associations of loftier aims and more complex problems.

But the exchange of ideas and this development of the "societal individualist" are not the only values of associations in a democracy. Experience in various associations is virtually a guarantee of respect for the majority will. As already pointed out, it does not lead necessarily to complete *acceptance* of the majority will, but it does lead usually to a sufficient respect for that will to enable the group to act in concert once that will is determined. This acquiescence in the majority will, based in large part on experience in associations of various types, is an important explanation for the fact that Americans can close ranks and function as a strongly united nation after an election which is preceded by almost violent contests between the two major political parties.

De Tocqueville stated:

> . . . [T]hey cannot belong to these associations for any length of time without finding out how order is maintained amongst a large number of men, and by what contrivance they are made to advance, harmoniously and methodically, to the same object. Thus they learn to surrender their own will to that of all the rest, and to make their own exertions subordinate to the common impulse — things which it is not less necessary to know in civil than in political associations. Political associations may therefore be considered as large free schools, where all the members of the community go to learn the general theory of association.[6]

Democratic acquiescence in the majority will is a strong surety for the proper performance in world organizations of nations with that tradition. It might very well be that American efforts to democratize totalitarian countries could in the long run profitably center on the attempt to direct individuals in those countries into the habit of more frequent and diverse associational experiences.[7]

The educational factor in the institution of association is not its only usefulness. The existence of certain types of associations, particularly those of the various professional groups, serves to relieve the citizenry of the necessity of imposing governmental regulations and restrictions to the degree that would be required without these associations. In all probability the medical practitioners in the United

6. Alexis de Tocqueville, DEMOCRACY IN AMERICA, Vol. II, p. 107 (Reeve trans., London, 1889).

7. For a brief discussion of voluntary associations in a dictatorship, see J. A. Corry, ELEMENTS OF DEMOCRATIC GOVERNMENT, pp. 284-287 (New York, 1951).

States are much more concerned with maintaining a proper status and standing in the American Medical Association than they are with legislation regulating their practice. This is probably true because the great bulk of the legislation regulating medical practices has come into being at the request of doctors and the medical associations.[8] This is not always the case, as witness the Massachusetts prohibition against the teaching or advocacy of birth control methods by doctors in that state, but in general this appears to be true. The examinations themselves for the licensing of doctors are drawn up and administered by boards composed of doctors and acting under the general supervision of medical associations.[9] Thus in great measure the regulation of the practice of medicine is self-imposed regulation springing from within the members of the profession itself. If this system of regulation works in practice, and in spite of certain defects it appears to operate to the benefit of Americans generally, then it obviously relieves the people of the responsibility of determining in each minute facet of medical practice what regulations should be imposed. And in addition its operation reduces the number of enforcement personnel necessary for the State to administer the regulations. The doctors, in association, take care of their own dirty linen without the necessity for a great deal of outside control.

These internal and extra-legal sanctions have ramifications which extend far beyond the particular professional activities of the association involved. Obviously the fear of loss of standing in the American Medical Association will operate to keep the individual doctor from violating the rules and ethics set out by that Association. But in addition, one of the important incentives for labor and research in the doctor's chosen field is the recognition and respect of other members of his group. The slow development of the status of doctors from the position of barber-bleeder to their present position of prestige in the community[10] has been due not only to the various medical associations' insistence on technical competence, but to their emphasis on reasonable conformity to local conceptions of community morality in all areas of daily living. And no matter whether the particular association be tightly organized, as are the

8. Of the New Jersey Medical Society; Dayton McKean says, "It can usually block such bills as it does not like and it can secure the passage of the measures it approves." PRESSURES ON THE LEGISLATURE OF NEW JERSEY, p. 71 (New York, 1938).

9. On the control over entrance into various professions by the professions themselves, see Francis P. DeLancey, THE LICENSING OF PROFESSIONS IN WEST VIRGINIA (Chicago, 1938).

10. See Howard W. Haggard, DEVILS, DRUGS, AND DOCTORS (Garden City, 1929), for an account of the development of the status of obstetrics.

medical and bar associations, with strong sanctions at their disposal, or very informally organized with a mundane purpose and few sanctions to employ against obstreperous members, the fear of the scorn or displeasure of the others in the association is a strong deterrent to violation of the canons of good conduct, whether laid in custom only or in legislation. The lawyer does not ordinarily engage in barratry because of the danger of disbarment and loss of the privilege of practicing his chosen profession. But neither does he usually engage in other practices violative of community morality, because his opportunities for promotion and advancement in the profession depend in great part on the esteem and respect of his fellow association members. Without the association there would still be the deterring effect of community displeasure, of course, but the force of this effect would be less strong than that of his professional association. Nor is the associational sanction absent when the particular group is not a professional group. The effect is still potent even though the group be only a Tuesday Reading Club or a Country Club association. Members guard their reputation and that of their families in order to retain the approbation of their fellow members. And in fact the effect extends even outside the membership to those persons who wish to obtain invitations to membership. The net result, then, is that the operation of many associations serves to eliminate the necessity for much government regulation which otherwise might be required. The association also serves as an informal law enforcing institution of probably greater potency than many of the formal enforcement agencies. Associations are in a large sense sub-governmental institutions.[11]

These points are given great emphasis by some of the philosophical anarchists. They are at the core of Kropotkin's argument that formal government is unnecessary. He pointed out that without government, every normal individual will become a member of some association. And where some individuals are impelled to antisocial acts, fear of expulsion from the various fellowships or associations will supply the necessary corrective.[12]

In addition to the educational and sub-governmental values, there is a third. Associations operate as a check on the tyranny of the majority and at the same time the possible despotism of a few. Both are inherent dangers in a democracy. De Tocqueville states:

11. See Charles E. Merriam, PUBLIC AND PRIVATE GOVERNMENT (New Haven, 1944).
12. Francis W. Coker, RECENT POLITICAL THOUGHT, p. 212 (New York, 1934). See also A. P. Kropotkin, MUTUAL AID, c. 8 (New York, 1919).

> . . . At the present time the liberty of association has become a necessary guarantee against the tyranny of the majority. In the United States, as soon as a party has become dominant, all public authority passes into its hands; its private supporters occupy all the offices and have all the force of the administration at their disposal. As the most distinguished members of the opposite party cannot surmount the barrier that excludes them from power, they must establish themselves outside of it and oppose the whole moral authority of the minority to the physical power that domineers over it. Thus a dangerous expedient is used to obviate a still more formidable danger.
>
> The omnipotence of the majority appears to me to be so full of peril to the American republics that the dangerous means used to bridle it seem to be more advantageous than prejudicial . . . . There are no countries in which associations are more needed to prevent the despotism of faction or the arbitrary power of a prince than those which are democratically constituted. In aristocratic nations the body of the nobles and the wealthy are in themselves natural associations which check the abuses of power. In countries where such associations do not exist, if private individuals cannot create an artificial and temporary substitute for them I can see no permanent protection against the most galling tyranny; and a great people may be oppressed with impunity by a small faction or by a single individual.[13]

De Tocqueville was referring primarily to political associations in his discussions. However, so many present-day associations operate as pressure groups, whether continuously or intermittently, that the right of protection against majority tyranny or even factional tyranny must include more than just political associations as such. While we do not have a multi-party system in the United States, it might be said that within the two major parties there is a multi-associational system. And a victory by either party to some degree represents not simply the single party victory which appears on the surface, but in a sense a coalition victory for the associations combining to effect majority support. Since the nominal victor can only retain power by espousing what might be called the lowest common denominator of legislative policy acceptable to the components of the victorious combination, the danger of tyrannous behavior is minimal. The people acting through associations are much more alert to the possibilities of injurious legislation and executive action than are

13. Alexis de Tocqueville, DEMOCRACY IN AMERICA, Vol. I, pp. 194-5.

individuals acting as individuals. In addition, the concerted protests of associations have greater effect on legislative decisions than do scattered complaints of individuals.[14]

There is also some apparent stimulus connected with the act of association which almost immediately suggests the possibility of reaching desired goals through political action. This appears to be true even when the goal is not necessarily best attained by shifting the pattern of governmental action. Whether any particular program of action is wise or unwise, however, the value to a democracy is that of any well operated system of pressure groups. First, concerted action or pressure on governmental agencies has a far greater chance of success than does the sporadic pressure of numerous individuals acting separately. If influencing government is the chosen method of action, then associations and association pressure give the individual an opportunity to exert effective influence which he would not otherwise have. On this point the preamble to the constitution of the United States Brewers' Association states:

> Cooperation is necessary. Owners of breweries, separately, are unable to exercise a proper influence in the legislative and public administration. It appears especially necessary for the brewing trade that its interests be vigorously and energetically prosecuted before the legislative and executive departments, as this branch of business is of considerable political and financial importance, exerting a direct as well as an indirect influence on political and social relations.[15]

A single fisherman would have little prospect of getting a legislative body to enact legislation controlling stream pollution. But when all the local chapters of the Isaac Walton League put pressure on the state and national legislatures, then action on this point is obtained. As for the "pressure potential" in this country, a recent writer points out that there are some 8,000 trade associations, 30,-

14. See, for example, the study of the activity of one of the most effective pressure groups in this century: Peter H. Odegard, PRESSURE POLITICS: THE STORY OF THE ANTI-SALOON LEAGUE (New York, 1928). For general discussions see: V. O. Key, POLITICS, PARTIES, AND PRESSURE GROUPS, c. VI (3d ed., New York, 1952); Howard Penniman, editor SAIT'S AMERICAN PARTIES AND ELECTIONS, c. VI (5th ed., New York, 1952); Peter H. Odegard and E. Allen Helms, AMERICAN POLITICS, c. XXII, (2d ed., New York, 1947). For a study of the unsuccessful opposition to the Rent Control Act of 1949, see Stephen K. Bailey and Howard S. Samuel, CONGRESS AT WORK, c. X (New York, 1952).

15. Quoted by V. O. Key, POLITICS, PARTIES, AND PRESSURE GROUPS, p. 177 (2d ed., New York, 1948).

500 associations concerned with agriculture, over 50,000 women's associations, and about 500 professional associations.[16]

Although the associative device is valuable as a means of exerting influence on legislatures and administrative bodies, it is no less valuable as a source of information for those groups to enable them to act intelligently as policy makers. V. O. Key states that:

> Pressure groups fill a gap in our formal political system by performing a function of representation beyond the capacities of representatives chosen by the voters in geographical districts. If it is the duty of government in a democracy to reflect the wishes of the people, means have to be found to ascertain those wishes . . . . Special interests came to be organized so that, in part, the cheese makers, the laborers, the drys, or others of like views and interests might have representatives who could state their attitudes authoritatively before the government and the public.[17]

When the legislators have the information on the views of their constituents, then they can act to reconcile and compromise the conflicting interests intelligently. In the *Federalist* Madison stated:

> A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.[18]

While Madison's emphasis was on economic classes or factions, it would not seem amiss to include other special interest groups in the context of his statement. V. O. Key takes this additional step and says:

> The principal driving forces in politics are class interests and group interests; they make themselves felt regardless of the kind of government or social organization that exists. It is a

16. Dayton D. McKean, PARTY AND PRESSURE POLITICS, p. 430 (Boston, 1949).
17. V. O. Key, POLITICS, PARTIES, AND PRESSURE GROUPS, p. 178 (2d ed., New York, 1948). See also Hugh A. Bone, AMERICAN POLITICS AND THE PARTY SYSTEM, pp. 242-244 (New York, 1949).
18. THE FEDERALIST, No. 10, p. 56 (Modern Library ed., New York, 1941).

> function of government to attempt to reconcile the interests of these groups, to devise policies that provide an accommodation among conflicting drives, to maintain social unity despite the inevitable diversity of interest of social groups and classes. Freedom of association and freedom of expression of interest facilitate the resolution of conflict through open discussion of divisive issues. If a citizen is dissatisfied, he is free to organize his own society to advance his own cause. Moreover, the promotion of the public good cannot be accomplished apart from class or special interest. The public good is, after all, a relative matter. It rarely consists in yielding completely to the demands of one class or group in society. It more often consists in the elaboration of compromise between conflicting groups, in the yielding to one class at one time and to another at another, and sometimes in the mobilization of the support of the great unorganized general public to batter down the demands of class interest.[19]

If the main task of government, or even one of the main tasks, is to reconcile or regulate the various interests in a democratic society, then certainly the legislative bodies can well use information gleaned from the positions taken by these various interests. And the associations which operate as pressure groups, even if only occasionally, perform a real service in advising legislators. Congressman Kefauver declared in 1947 that Congress, even after its reformation under the Reorganization Act,[20] could not function without the lobbyists.[21] And the lobbyists' existence depends upon the existence of associations.

There is a further step which the interest or pressure group which gains sufficient numerical and financial support might take, and this is formation into a political party. While few of the total number of interest groups in this country have taken this further step, there have been some.[22] The Prohibition Party is a notable example. And agrarian, Catholic, and labor parties have been formed in some democratic societies. Certainly association within political parties is a

19. V. O. Key, *op. cit.*, p. 197.
20. 60 Stat., at L. 812.
21. Wilfred E. Binkley and Malcolm C. Moos, A GRAMMAR OF AMERICAN POLITICS, p. 466 (New York, 1951).
22. For discussions of the minor parties see: V. O. Key, *op. cit.*, c. X; Peter H. Odegard and E. Allen Helms, AMERICAN POLITICS, pp. 799-803 (2d ed., New York, 1947); Howard R. Penniman, SAIT'S AMERICAN PARTIES AND ELECTIONS, c. XII (5th ed., New York, 1952).

major aspect of democratic society.[23] The party is our most important association, and the right to form a party or belong to one is not left to the vagaries of group decision. It is a matter of law.[24]

Joseph Starr states that the usual judicial interpretation is that the right to form political parties is part of the right to vote, and quotes the Wisconsin Supreme Court:

> The right of suffrage includes the right of voters to separate into groups according to their political beliefs respecting governmental policies, and the right of every group to organize and have all the machinery in that regard not reasonably prohibited by law for making the organization effective as regards declaring the policy of its members, and vitalizing such policies by electing officers in harmony therewith to legislate and execute law to that end.[25]

It can also be stated with considerable justification that the right to organize political parties is simply an inherent right of a free people. If parties are a natural result of freedom of speech and freedom of assembly as applied to operations of government, then the right to form parties must be protected to safeguard the basic rights of the people. On whatever its basis rests, however, the courts have held that the legislature does not have the power to deny to the people the right generally to organize political parties.[26]

Since one of the main purposes of formation into political parties is the capture of public office, the question arises as to how parties get their candidates on the ballot. In this aspect of party association there are more definite legal provisions.

In most of the states the direct primary is the method used for nomination of candidates. The two major parties and others which have a strong following have no difficulty obtaining recognition in the primaries. Parties are defined by statute in all but six of the states in terms of numerical strength. The requirements are expressed in terms of the per cent which the party obtained of the total vote for

23. See Peter H. Odegard and E. Allen Helms, *op. cit.*, pp. 788-789; V. O. Key, *op. cit.*, c. VIII; Howard R. Penniman, *op. cit.*, cc. IX-X; E. E. Schattschneider, PARTY GOVERNMENT, c. I (New York, 1942); Hugh A. Bone, AMERICAN POLITICS AND THE PARTY SYSTEM, c. XI (New York, 1949).

24. See Joseph R. Starr, "The Legal Status of American Political Parties," 34 AMER. POL. SCI. REV. 439, 685 (June and August, 1940).

25. *Ibid.*, at 444.

26. Britton v. Board of Election Commissioners, 129 Cal. 337, 61 Pac. 1115 (1900); Davidson v. Hanson, 87 Minn. 211, 91 N. W. 1124 (1902); *Ex parte* Wilson, 7 Okla. Crim. Rep. 610, 125 Pac. 739 (1912); Sarlls v. State *ex rel.* Trimble, 210 Ind. 88, 166 N. E. 270 (1929).

some officer voted for throughout the state, such as governor. Starr states: "The minimum size for a political party to obtain recognition under the primary act is usually expressed in a percentage of the total vote cast in the last general election, and these percentages now range from one per cent to one quarter of the total vote. In New York and Texas, the requirement is expressed instead in round numbers — 50,000 and 100,000, respectively."[27]

This requirement, however, gives no room for participation by new parties. A few states make provision for this exigency, customarily by presentation of a petition signed by a specified number of qualified voters.

> Arizona permits a group to qualify by filing a petition signed by a number of voters equal to at least two per cent of the votes cast for governor in the last election, provided signatures are obtained in at least five counties. California permits a political party to participate in the direct primary whenever its enrolled registrants equal one per cent of the entire vote cast in the last election, or if a petition is signed by voters to the number of at least ten per cent of the entire vote in the last election is filed. Nebraska permits a new political party, organized in a mass convention, to have a separate ballot in the ensuing primary election . . . . In Ohio, the petition requirement is fifteen per cent, in South Dakota three per cent, and in Wisconsin one-sixth of the voters in at least ten counties.[28]

South Carolina permits parties which offered candidates for presidential and vice-presidential electors in the previous election to be certified as political parties by the Secretary of State, and new parties may obtain such certification by filing with the Secretary a petition signed by ten thousand or more registered electors residing in the state.[29]

The process of selection of candidates then goes to the final stage in the general election. And provision for participation in the primary includes participation in the general election. Thus parties with sufficient strength are assured a place in the primary and in the general election ballot. The smaller ones are left without ability to participate in the primary, and their candidates can appear on the general election ballot only through write-ins.

There is some justification for keeping the very small parties off

27. Joseph R. Starr, *op. cit.*, at 453.
28. *Ibid.*, at 454.
29. South Carolina ACTS, 1950, No. 858, § 6-A.

the ballot. Ballots in many states are sufficiently confusing with only two parties represented, without further adding to the confusion. And since the expense of printing is borne by the state, it is justifiable for the state to set reasonable minimums which new parties must meet in order to prevent the onerous expenditure occasioned by listing every party slate merely on request of a handful of publicity seekers.

As our most important associations, political parties must be as free as possible from official control. The danger to be avoided is the making of political parties into agencies of the state, as has been done in the totalitarian countries. Certainly absolute freedom is not to be desired, but the opportunity should be broad for small as well as large political organizations to vie for governmental control within rules safeguarding honest and democratic procedures. The question of what has been done and what should be done about participation of Communists and criminal syndicalists raises special problems, and is discussed below.

The conclusion is, then, that associations offer a real contribution in a democratic society. Whether the particular association is purely local with the most mundane purpose or is a vast political party, so long as its activities are legal it can be of positive benefit to our society. This does not, however, lead to the conclusion that associations are properly to be left completely unregulated. The right to associate is important, but it cannot be an absolute right when its exercise will endanger the lives, property or liberty of others. Certainly such associations as Murder, Incorporated, which during the late 1940's could be employed, for a fee, to eliminate one's enemies,[30] cannot be justified as operating under any constitutional guarantee. The questions, are, however, how far should the legislature go in restricting the right of association, and which associations can properly be forbidden altogether?

Association With Criminals

In McQuillin's *Law of Municipal Corporations,* it is stated that, "'The question of unconstitutional restriction of liberty of association has arisen, insofar as ordinances are concerned, most frequently in connection with ordinances prohibiting and penalizing association with persons of ill repute."[31] The reported cases indicate that the

30. For a study of this syndicate see Burton B. Turkus and Sid Feder, MURDER, INC. (New York, 1951).
31. Eugene McQuillin, THE LAW OF MUNICIPAL CORPORATIONS, Vol. 5, pp. 561-562 (3rd ed., by Ray Smith, Chicago, 1949).

courts uniformly hold ordinances invalid which penalize mere association without unlawful acts.

A St. Louis ordinance prohibited the knowing, willing, and unlawful association with persons having the reputation of being thieves, burglars, pickpockets, pigeon droppers, and gamblers, for the purpose of conspiring to aid them in gambling, gaming, and pigeon dropping, at various gambling houses. In *St. Louis v. Roche*,[32] in 1895, Roche was tried and convicted for violation of the ordinance. On appeal to the Missouri Supreme Court the conviction was reversed. The opinion stated:

> The offense consists, not in aiding or abetting in the commission of some specific unlawful act, or in conspiring to do so, but in knowingly and unlawfully associating with certain persons having the reputation of being thieves and burglars . . . with the design and intent of conspiring . . . . Our constitution and laws guarantee to every citizen the right to go where and when he pleases, exacting from him only that he conduct himself in a decent and orderly manner, that he disturb no one, and that he interfere with the rights of no other citizen . . . .
>
> However humble may be the citizen arrested under an ordinance prohibiting intercourse with such former criminal, his right to select his own company, so long as no actual breach of law occurs, . . . is sacred, and as much under the protection of the state, as though he moved in the more elevated spheres of society.[33]

In the *Roche* case the Court reversed the conviction, but did not hold the ordinance unconstitutional except as applied in that case. In the following year, in *Ex parte Smith*[34] the Court held the ordinance invalid on its face. Judge Sherwood, speaking for the Court, stated:

> Obviously there is no difference in point of legal principle between a legislative or municipal act which forbids certain associations, and one which commands certain associations. We deny the power of any legislative body in this country to choose for our citizens whom their associates shall be.[35]

While the holding appears to be proper, the reasoning does not seem to be very persuasive. The constitutionality of legislative pro-

32. 128 Mo. 541, 31 S. W. 915 (1895).
33. 31 S. W. 915, 917 (1895).
34. 135 Mo. 223, 36 S. W. 628, 33 L.R.A. 606 (1896).
35. 36 S. W. 628, 629 (1896).

hibitions does not hinge on whether the legislature could attempt the converse and command the same action in another place or in conjunction with other persons. The constitutionality of a municipal ordinance prohibiting residences in business zones does not hinge on the converse authority to command that certain persons build their homes on certain specific lots. Merely to have shown that the ordinance is an unreasonable restraint on personal liberty should have been sufficient.

A similar type of ordinance was contested in *Hechinger v. Maysville*,[36] although the outcasts were prostitutes in this instance. The Maysville, Kentucky, ordinance declared it unlawful for any person other than the husband, father, brother or male relative, to associate with any female known as a common prostitute, either by day or by night, upon any of the streets or alleys of the city. The Kentucky Court of Appeals held the ordinance invalid because a mother or sister should be allowed the same privilege as allowed to the father or brother, and any person should be allowed to converse with such prostitute long enough to transact any necessary and legitimate business.

Apparently the only case of this nature to reach the United States Supreme Court was *Lanzetta v. New Jersey*,[37] decided in 1939. Lanzetta was convicted of violating the New Jersey Gangster Act of 1934, which provided:

> Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State, is declared to be a gangster . . . .

The penalty for conviction as a "gangster" under this law was a fine not exceeding $10,000 or imprisonment not exceeding twenty years, or both. The Court held the law violative of the due process clause of the Fourteenth Amendment because of vagueness in what it purported to denounce. Justice Butler, speaking for the Court, said:

> The phrase "consisting of two or more persons" is all that purports to define "gang". The meanings of that word indicated in dictionaries and in historical and sociological writings

36. 22 Ky. L. Rep. 486, 57 S. W. 619 (1900). For other cases holding similarly on this type of ordinance, see: Lancaster v. Reed, 207 S. W. 868 (Mo. App. 1919); Coker v. Ft. Smith, 162 Ark. 567, 258 S. W. 388 (1924).
37. 306 U. S. 451 (1939).

> are numerous and varied. Nor is the meaning derivable from the common law, for neither in that field nor anywhere in the language of the law is there definition of the word. Our attention has not been called to, and we are unable to find, any other statute attempting to make it criminal to be a member of a "gang". . . .
>
> The lack of certainty of the challenged provision is not limited to the word "gang" or to its dependent "gangster". . . . The enactment employs the expression, "known to be a member." It is ambiguous. There immediately arises the doubt whether actual or putative association is meant. If actual membership is required, that status must be established as a fact, and the word "known" would be without significance. If reputed membership is enough, there is uncertainty whether that reputation must be general or extend only to some persons. And the statute fails to indicate what constitutes membership or how one may join a "gang".[38]

Thus while association which amounts to conspiracy to commit a crime may be prohibited, mere association with criminals or unsavory characters may not.

Labor Unions

A comprehensive treatment of the development of labor law in the United States would not only be out of place here, but would be altogether too unwieldy for inclusion.[39] This discussion, then, is confined to the development of the right of laborers to associate together for certain purposes as laborers, without particular emphasis on means employed by such associations to gain their ends.

One writer states that:

> The common law, while leaving employers unrestrained in their use of economic force, placed severe limitations on unions.

38. 306 U. S. 451, 453-4, 458 (1939).

39. For more comprehensive treatments see: Robert E. Matthews (editor), LABOR RELATIONS AND THE LAW (Boston, 1953, advance printing); Charles O. Gregory, LABOR AND THE LAW (New York, 1949); Edward Berman, LABOR AND THE SHERMAN ACT (New York, 1931); Felix Frankfurter and Nathan Greene, THE LABOR INJUNCTION (New York, 1930). For general histories of labor unions in the United States see: John R. Commons and associates, A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, 10 vols. (Cleveland, 1910); Seliq Perlman and Philip Taft, HISTORY OF LABOR IN THE UNITED STATES, 1896-1932, LABOR MOVEMENTS (New York, 1935); Harold W. Metz, LABOR POLICY OF THE FEDERAL GOVERNMENT (Washington, 1945); Herbert Harris, AMERICAN LABOR (New Haven, 1938); Foster R. Dulles, LABOR IN AMERICA (New York, 1949).

> Originally the courts considered unions illegal combinations obstructing the free play of economic forces in the labor market. Any concerted action by workers to better their conditions was unlawful . . . .
>
> Although unions came to be recognized as legal combinations, they were not permitted the same freedom as employers to use their economic strength. The courts rigidly circumscribed their activities, practically frustrating any effective action. Only gradually was the area of freedom extended, as the judicial attitude toward unions changed. The legal limitations on unions, therefore, consist primarily of judge-made rules. Legislation has sought to alleviate the harshness of those limitations. This is in direct contrast to the limitations on employers which are almost solely legislative in origin.[40]

The earliest legal theory applied restrictively to labor unions was based on the common law concept of criminal conspiracy. Under this doctrine the lawful activities of an individual would be held unlawful when done in concert with other individuals. If this doctrine is carried to the extreme, as it was in some cases, it is clear that all action of the unions relative to their employment would be illegal.

The first American case on this point, commonly described as the "First American Labor Case,"[41] was the *Philadelphia Cordwainers' Case (Commonwealth v. Pullis)*,[42] tried in the Mayor's Court in 1806. The indictment was for conspiracy of several journeymen cordwainers in the shoe industry. It charged them with combining together in a society to refuse to work except at certain rates, to threaten and menace other cordwainers who worked at rates lower than those set, and to refuse to work for any employer who hired any cordwainer who did not abide by the rules of the society.

In his charge to the jury, Recorder Levy answered the contention that the spirit of the revolution and the principles of the common law were opposite in the case. He stated that the activity of the combination "is pregnant with public mischief and private injury . . . tends to demoralize the workmen . . . destroy the trade of the city, and leaves the pockets of the whole community to the discretion of the concerned. If these evils were unprovided for by the law now exist-

40. Robert E. Matthews editor, LABOR RELATIONS AND THE LAW, Vol. II, p. 635 (Boston, 1953, advance printing).
41. See Nelles, "The First American Labor Case," 41 YALE L. J. 165 (1931).
42. *Ibid.*, p. 637, quoting from 3 Commons and Gilmore, A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59-248 (1910).

ing, it would be necessary that laws should be made to restrain them."[43] He stated further that, "A combination of workmen to raise their wages may be considered in a two fold point of view: one is to benefit themselves . . . . The other is to injure those who do not join their society. The rule of law condemns both."[44] After this virtual directed verdict of guilty, the jury followed the suggestion and found the defendants guilty of a combination to raise their wages. A number of other cases followed the *Cordwainers' Case* involving criminal prosecutions for organizing to compel higher wages.[45]

Foster Dulles states that "These conspiracy cases aroused widespread resentment among the workingmen. Were all other combinations, among merchants, among politicians, among sportsmen, among 'ladies and gentlemen for balls, parties, and banquets' to be permitted, they asked, and only the poor laborers combining against starvation to be indicted?"[46] He states further:

> The issue was injected into local policies [sic]. Federalists and Jeffersonian Republicans were at the time engaged in a bitter controversy over the general use of English common law in the United States, and the latter considered the application of what they termed its undemocratic principles to labor unions a challenge to the whole cause of liberty. The right of association could not be divorced from other fundamental rights, the Republicans declared, and they zealously took up the workingmen's cause . . . .
>
> The controversy was to continue for many years to come but the decisions against the workingmen stood. They did not stop the further organization of labor societies nor wholly prevent the use of strikes and boycotts. When the employers resorted to the courts, however, the workingmen were hard pressed to defend themselves against conspiracy charges.[47]

The year 1842 marked a landmark decision with respect to criminal prosecutions against labor associations, *Commonwealth v. Hunt*.[48] In that case the Massachusetts Supreme Court reversed the conviction of the Boston Journeymen Bootmakers who were charged with caus-

43. *Ibid.*, p. 638.
44. *Ibid.*, p. 639.
45. See People v. Melvin, 2 Wheller Cr. Cas. 262 (1810); Pittsburg Cordwainers' Case (1815), 4 Commons and Gilmore, A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 15 (1910); People v. Fisher, 14 Wend. 10 (New York, 1835).
46. Foster R. Dulles, LABOR IN AMERICA, p. 30 (New York, 1949).
47. *Ibid.*, pp. 30-31.
48. 4 Metc. 111 (Mass. 1842).

ing the discharge of a member who accepted less than the established wage rate. In holding the indictment insufficient, Chief Justice Shaw stated:

> The manifest intent of the association is, to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones. If the latter were the real and actual object, and susceptible of proof, it should have been specially charged . . . . But in order to charge all those, who become members of an association, with the guilt of a criminal conspiracy, it must be averred and proved that the actual, if not the avowed object of the association, was criminal.[49]

Thus the case held that the mere fact of associating in a labor organization and using the organizational strength to attain certain employment benefits was not alone ground for indictment under criminal conspiracy. Either the purpose or the means employed by such organizations must be charged as illegal to come within the conspiracy doctrine.

The *Hunt* case, while it did not mark the end of such prosecutions, did apparently represent the turning point. And one of the latest reported cases was twenty-five years later, in 1867, when the New Jersey Court held that a combination of workers which sought to compel a discharge of nonunion workers constituted a criminal conspiracy.[50]

But the discontinuance of criminal conspiracy prosecutions did not mark the end of legal limitations on the right of laborers to organize. "The conspiracy theory was scarcely laid to rest as creating a criminal offense when it was reborn as creating a civil liability in tort."[51] Justice Holmes stated the doctrine in a dissenting opinion in *Vegelahn v. Guntner:*[52]

> I agree, whatever may be the law in the case of a single defendant, . . . that when a plaintiff proves that several persons have combined and conspired to injure his business, and have done acts producing that effect, he shows temporal damage and a cause of action, unless the facts disclose, or the defendants

49. 4 Metc. 111, 129 (Mass. 1842).
50. State v. Donaldson, 32 N. J. L. 151 (1867).
51. Robert E. Matthews, editor, LABOR RELATIONS AND THE LAW, Vol. II, p. 641 (Boston, 1953, advance printing).
52. 167 Mass. 92, 44 N. E. 1077 (1896).

> prove, some ground of excuse or justification. And I take it to be settled, and rightly settled, that doing that damage by combined persuasion is actionable, as well as doing it by falsehood or by force . . . .[53]

Since liability in tort is almost as serious a deterrent as criminal prosecution, the employees still had no right to associate effectively in a union. And the wholesale use of the injunction followed the adoption of the doctrine of civil liability.

But this was not the only disability under which the labor unions suffered. During the latter part of the 19th century there came into vogue the "yellow-dog" contracts under which prospective employees agreed, as a condition of employment, not to join a union. In 1898 the Congress passed the Erdman Act,[54] one provision of which outlawed the use of "yellow-dog" contracts by carriers in interstate commerce. In 1908, in *Adair v. United States*,[55] the United States Supreme Court held this provision unconstitutional because labor organizations "have nothing to do with interstate commerce, as such." And in 1915, in *Coppage v. Kansas*,[56] the Court held a Kansas law which outlawed "yellow-dog" contracts invalid under the Fourteenth Amendment as violative of the liberty of contract. And even before these cases were decided, there was another of still greater effect — the *Danbury Hatters case*.[57] In that case the Court held that concerted labor activity such as a strike or a boycott constituted a violation of the Sherman Anti-Trust Act if it were designed to restrict interstate commerce to a substantial degree.

In spite of these hindrances, however, laborers were making some slow progress toward the goal of an actual right of association. The first World War was the occasion for some of these gains. Harold Metz states:

> In January 1918 the Secretary of Labor called upon twelve representatives of management and labor to formulate a wartime labor policy. The resulting statement of the War Labor Conference Board declared that workers had a right to organize and that employers should not discriminate against them for so doing.[58]

53. 167 Mass. 92, 105 (1896).
54. 30 STAT. 424.
55. 208 U. S. 161 (1908).
56. 236 U. S. 1 (1915).
57. Loewe v. Lawlor, 298 U. S. 274 (1908).
58. Harold Metz, LABOR POLICY OF THE FEDERAL GOVERNMENT, p. 27 (Washington, 1945).

The Clayton Act,[59] passed in 1914, was hailed by labor as their Magna Carta. But it is obvious that if it had been all the laborers thought, there would have been no necessity for the statement of the War Labor Conference Board. The belief that the Act outlawed injunctions in the Federal courts in labor disputes was dispelled very shortly. Section 20 of the Act stated:

> That no restraining order or injunction shall be granted by any court of the United States . . . in any case between employers and employees . . . growing out of a labor dispute . . . unless necessary to prevent irreparable injury to property, or to a property right . . . .
>
> And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working, . . . or from peaceably assembling in a lawful manner and for lawful purposes . . . .

In one of the leading cases interpreting the anti-injunction clauses, *American Steel Foundries v. Tri-City Central Trades Council*,[60] Chief Justice Taft declared, for the Court, that the clause was never intended to preclude injunctions issued for the purpose of protecting property, and that injury to business was included in injury to property. The case arose from a reduction of wages by the Foundries. Workers, members of the Central Trades Council, struck and picketed the shop to dissuade other workers or would-be workers from entering the shop. Violence occurred at various locations. In 1914 the Foundries filed a bill in a United States District Court to enjoin the Council from attempting by persuasion or violence to hinder persons who wanted to work for the Foundries. The Court granted a permanent injunction in the terms requested. The Court of Appeals affirmed, except that it deleted the injunction against "persuasion".

In the Supreme Court, the Chief Justice placed the question squarely under the Clayton Act, and proceeded to interpret away any in-

59. 38 STAT. AT L. 738 (1914).
60. 257 U. S. 184 (1921).

tent of Congress to add substantially to labor's rights in industrial disputes. He said that in the Clayton Act:

> Congress wished to forbid the use by the Federal courts of their equity arm to prevent peaceable persuasion by employees, . . . and to secure them against judicial restraint in obtaining or communicating information in any place where they might lawfully be. This introduces no new principle into the equity jurisprudence of those courts. It is merely declaratory of what was the best practice always.[61]

While the Court upheld the District Court in the general propriety of the issuance of the injunction, it also upheld the Court of Appeals in its deletion of the operation of the injunction against peaceful persuasion. It is here that Chief Justice Taft presented the view of the Court on the right of labor to organize in 1921:

> Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts . . . . To render this combination at all effective, employees must make their combination extend beyond one shop . . . . Therefore, they may use all lawful propaganda to enlarge their membership, and especially among those whose labor at lower wages will injure their whole guild.[62]

While the courts placed the major emphasis on the economic aspects of association of laborers, there are other aspects of importance, also. In spite of the industrial counter-attacks in the first ten or fifteen years of the twentieth century, membership in labor organizations grew. In explanation, Foster Dulles says:

> The urge to join a union, in these years as in other periods, came not only from expectation of economic gain through collective action. The hope that he would attain greater security — a square deal and protection from arbitrary discipline — was always highly important, but there was also an often unconscious desire on the part of the individual wage earner to strengthen his feeling of individual worth and significance in an industrialized society. Machinery was more and more making the worker an automatic cog in a process over which he had no influence or control. The complete impersonality of corporate

61. 257 U. S. 184, 203 (1921).
62. *Ibid.*, at 209.

> business, with management far removed from any direct contact with employees, further accentuated this loss of individual status. The wage earner could find a satisfaction in membership in such a meaningful social organization as a labor union that was denied him as one among many thousands of depersonalized employees. The desire to take part in some group activity was, indeed, particularly strong during the progressive era. It was a period marked by the rapid growth of social clubs, lodges, and fraternal associations. The unions, often including some of the ritual of the fraternal lodges, met a very real need entirely apart from the support they provided for collective bargaining.[63]

The National Industrial Recovery Act[64] of 1933 was the first law that generally guaranteed to all workers the right to organize. It declared that workers had the right to form unions free from employer domination, interference, or coercion. And in 1935 the National Labor Relations Act[65] added broader guarantees and established administrative means to enforce them. Section 7 of the National Labor Relations Act provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

This would seem to settle the question of labor's right to associate in unions, but in spite of this statute Colorado passed a Labor Peace Act in 1943. The Act prohibited labor unions and their individual members any right to assemble and function as unions unless incorporated under the laws of Colorado. In *A. F. of L. v. Reilly*,[66] decided in the following year, a test case was brought against the Act, the action being for a declaratory judgment. The trial court found the Act unconstitutional. In upholding the decision of the trial court, Justice Knous said for the Colorado Supreme Court:

> The courts of the United States for many years, and generally without regard to statute, have recognized the right of workmen to organize in labor or trade unions for the purpose of promoting their common welfare by lawful means . . . .

63. Foster R. Dulles, LABOR IN AMERICA, p. 205 (New York, 1949).
64. 44 STAT. 195 (1933).
65. 49 STAT. 449 (1935).
66. 113 Colo. 90, 115 P. 2d 145, 160 A.L.R. 873 (1944).

> Notwithstanding the contrary contention of counsel for defendants, we think the decisions indicate that the constitutional guarantee of assembly to the people is not restricted to the literal right of meeting together "to petition the Government for a redress of grievances" . . . .
>
> While these decisions may not as unequivocally place the right of workmen to organize and operate as a voluntary labor association within the area of the guarantees of assembly and free speech as the Thornhill case locates peaceful picketing within the perimeter of the latter, their purport seems to us to support the conclusion of the trial court that sections 20 and 21 transgressed constitutionally by denying to unincorporated labor unions, and their individual members any right to assemble and function as such in the promotion of their common welfare by lawful means . . . .[67]

The next step for labor, once the right of association had been won, was to use their organized force in securing or opposing various governmental programs. Philip Murray reported after the 1944 Presidential campaign: "Labor has long recognized that the gains which it wins through economic action can be protected, implemented and extended only if it develops a progressive program of legislation and secures its enactment through effective participation in the political life of the nation."[68] The statement was made in connection with his approval of the continuance of the Political Action Committee of the C.I.O. as an independent non-partisan instrument to promote united political activity on a nationwide basis.

A question arose in 1948 as to whether unions could publish in a union newspaper editorials or articles favoring specific candidates in a Federal election without violating Section 304 of the Taft-Hartley Act of 1947.[69] The C.I.O. and its president were indicted for violation of the Corrupt Practices Act of 1925, as amended by the Labor Management Relations Act of 1947, which prohibits contributions or expenditures by corporations and labor organizations in connection with Federal elections. The union president had published an article in support of one candidate in a congressional election. The United States District Court sustained a motion to dismiss on the ground that the Act, insofar as applied to union expenditures in Federal elections, violated the First Amendment.

67. 155 P. 2d 145, 148-149 (1944).
68. Foster R. Dulles, LABOR IN AMERICA, p. 351 (New York, 1949).
69. 61 STAT. 136 (1947).

The United States Supreme Court heard the case, *United States v. C.I.O.*,[70] on direct appeal. The Court held that since the indictment did not charge an offense under the Act, there was no necessity for ruling on its constitutionality. Justice Reed, speaking for the Court, said: "We find in the Senate debates definite indication that Congress did not intend to include within the coverage of the section as an expenditure the costs of the publication described in the indictment."[71] Included in the opinion was an extensive examination of the history of the legislation.

In a concurring opinion, Justice Rutledge, with whom Justices Black, Douglas and Murphy agreed, also made an extensive examination of the history of the legislation. And he concluded that the prohibited expenditures *did* include those listed in the indictment. Therefore, he said, the constitutionality of the Act would have to be determined. He then found the Act unconstitutional, thus reaching the same result as the majority following Justice Reed. The importance of Justice Rutledge's statements, in the context of this general discussion, warrants a lengthy quotation:

> The expression of bloc sentiment is and always has been an integral part of our democratic and electoral processes. They could hardly go on without it. Moreover, to an extent not necessary now to attempt delimiting, that right is secured by the guaranty of freedom of assembly, a liberty essentially coordinate with the freedoms of speech, the press, and conscience . . . .
>
> There is therefore an effect in restricting expenditures for the publicizing of political views not inherently present in restricting other types of expenditure, namely, that it necessarily deprives the electorate, the persons entitled to hear, as well as the author of the utterance, whether an individual or a group, of the advantage of free and full discussion and of the right of free assembly for that purpose.
>
> The most complete exercise of those rights is essential to the full, fair and untrammeled operation of the electoral process. To the extent they are curtailed the electorate is deprived of information, knowledge and opinion vital to its function. To say that labor unions as such have nothing of value to contribute to that process and no vital or legitimate interest in it is to ignore the obvious facts of political and economic life and of their increasing interrelationship in modern society . . . . That ostrich-

70. 335 U. S. 106 (1948).
71. *Ibid.*, at 116.

like conception, if enforced by law, would deny those values both to unions and thus to that extent to their members, as also to the voting public in general.[72]

Justice Rutledge thought that if there were evils present in union expenditures in Federal elections, then the Act should have been drawn narrowly to reach these evils without prohibiting all expenditure of union funds in such elections. And if, as Justice Reed's opinion stated, the Act did not prohibit all such expenditures, then Justice Rutledge felt that the Act was still unconstitutional as being so vague and indefinite that the labor organizations would not know in advance what expenditures would be legal and what illegal. The result in either case would be prior restraint on the exercise of First Amendment rights.

The acceptance by the courts and by the public generally of Justice Rutledge's philosophy shown in the above quotation would bring to full fruition the long struggle of laborers to associate together for mutual aid and, further, to use their association to influence the course of political events. The former function has generally been recognized as proper. But both the Congress and the public are in a great part unconvinced that the latter function is properly permitted to labor organizations operating as such.

Criminal Syndicalism and Communism

The most substantial restrictions against associations with a subversive purpose are the anti-sedition laws of the national and state governments.[73] These, however, are usually laws calling for criminal prosecution against persons who teach or advocate overthrow of the government by violence or who organize groups for that purpose. Since such activity more properly lies in the context of exercise of the right of free speech rather than freedom of assembly, it is outside the scope of this treatment. Questions dealt with herein are those dealing with restrictions on members of subversive groups which operate on those persons merely because they are members, not because of overt acts.

Section 2(3) of the Smith Act,[74] passed in 1940, provides:

> It shall be unlawful for any person . . . to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof . . . .

72. *Ibid.*, at 143-144.
73. Walter Gellhorn, editor, THE STATES AND SUBVERSION, Appendix A Ithaca, 1952).
74. 54 STAT. 670, 671.

The proscribed societies are those who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence. To date there have been no prosecutions under the Smith Act for membership only, but there is clearly a violation where such membership is established. The Act was modeled after the New York Criminal Anarchy Act of 1902, the advocacy section of which was under fire in *Gitlow v. New York*.[75]

In discussing the aftermath of Federal sedition laws during World War I, Chafee states:

> After the Espionage Act showed the ease with which men can be punished for political and economic discussion which is distasteful to the majority of citizens, thirty-three states made sedition in time of peace a serious crime. More than half these states adopted an almost uniform statute, which created the new crime of criminal syndicalism and was directed mainly against the Industrial Workers of the World.[76]

The California statute made unlawful the teaching of criminal syndicalism and, further, knowingly becoming a member of any group organized to advocate it (without the member's necessarily urging this doctrine himself). The leading case on this statute is *Whitney v. California,* decided by the Supreme Court in 1927.[77]

Miss Anita Whitney was convicted under this statute of assisting in organizing the Communist Labor Party of California, of being a member of it, and of assembling with it. The majority felt that association with criminal syndicalists "partakes of the nature of criminal conspiracy," and thus the conviction was upheld. Justice Brandeis, with whom Justice Holmes joined, concurred on the ground that Miss Whitney had not raised the issue of "clear and present danger", but otherwise he contested the decision of the Court. He stated:

> The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or assembling with others for that purpose is given the dynamic quality of crime. There is guilt although the society may not contem-

75. 268 U. S. 652 (1925).
76. Chafee, FREE SPEECH IN THE UNITED STATES, p. 326 (Cambridge, 1941).
77. 274 U. S. 357 (1927). For a full account of the case, see Chafee, *op. cit.*, pp. 343-354.

> plate immediate promulgation of the doctrine. Thus the accused is to be punished, not for attempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.[78]

Some municipalities have passed ordinances directed at membership in subversive organizations. The City of Birmingham, Alabama, passed an ordinance in 1950 which provided a $100 fine and a maximum of 180 days in jail for each day that a known Communist remained in the city. The ordinance further provided that membership in the Communist Party would be presumed if a person "shall be found in any secret or non-public place in voluntary association or communication with any person or persons established to be or to have been members of the Communist Party."[79] This is guilt by association with a vengeance.

In 1951 Massachusetts passed a statute which outlawed the Communist Party by name.[80] This was the first state law to go this far in anti-Communist action.

There are two specific restrictions on membership in subversive organizations which will be discussed here: restrictions on participation in the electoral process, and restrictions on public employment. There are other aspects of regulation which provide additional disabilities for membership in subversive organizations, but their scope and complexity preclude inclusion in this discussion. Some of these are: denial of access to the National Labor Relations Board to those unions whose officers do not sign a non-Communist affidavit;[81] denial of entry into the United States to aliens who are or were affiliated with groups classified as subversive;[82] deportation of aliens who are or were affiliated with such groups;[83] registration requirements

78. 274 U. S. 357, 372-373 (1927).
79. The New York *Times*, July 19, 1950.
80. Ann. L. of Mass. 1951 Supp., Ch. 264, § 16 *et seq.*
81. See American Communications Association v. Douds, 339 U. S. 382 (1950).
82. See the McCarran Immigration and Nationality Act of 1952, 66 STAT. 163. On the power of exclusion of aliens from the United States see Head Money Cases, 112 U. S. 580 (1884); Ekiu v. United States, 142 U. S. 651 (1892).
83. See the Nationalities Act of 1940, 54 STAT. 673; United States *ex rel.* Kaloudis v. Shaughnessy, 180 F. 2d 489 (2d Cir. 1950); Vergas v. Shaughnessy, 97 F. Supp. 335 (S. D. N. Y., 1951); Harisiades v. Shaughnessy, 342 U. S. 580 (1952).

under state laws and the McCarran Internal Security Act[84] for groups classified as subversive;[85] and restrictions on the right to engage in certain private occupations, such as the practice of law.[86]

Restrictions on access to the electoral process mainly consist of (1) exclusion of a party from the ballot, and (2) an oath requirement of candidates for public office that they do not believe in overthrow of the government by violence and that they are not affiliated with any organization which does so.

According to Gellhorn, there are fifteen states and territories which have laws falling in the first category.[87] The leading case on the constitutionality of such a prohibition is *Communist Party v. Peek*.[88] There were three major provisions of the California law which were involved in that case. One provided that no party "shall be recognized or qualified to participate in any primary election which uses or adopts as any part of its party designation the word 'communist' or any derivative of the word 'communist'." The California Supreme Court held this provision invalid as having no reasonable relation to the objective of eliminating subversive parties from the election process:

> The name adopted by a political party is frequently without any value in ascertaining the political beliefs of its adherents, and if the beliefs were pernicious, they would remain so despite a change in the name of the party.[89]

Another section of the law imposed the same prohibition against any party "which is directly or indirectly affiliated, by any means whatsoever, with the Communist Party of the United States, the Third Communist International, or any other foreign agency, political party, organization or government." On this provision the opinion stated:

> It is special legislation and it attempts to bar political beliefs merely by reference to the particular name borne by groups at

84. Public Law 831, 81st Cong., 2d Sess., 1950.
85. See William B. Prendergast, "State Legislatures and Communists: the Current Scene," 44 Amer. Pol. Sci. Rev. 556 (1950); Walter Gellhorn, ed., THE STATES AND SUBVERSION (Ithaca, 1952).
86. See American Bar Association resolutions in 37 A.B.A.J. 312-313 (1951). For other cases and notes on these undiscussed points, see Thomas I. Emerson and David Haber, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, c. IV (Buffalo, 1952).
87. Walter Gellhorn, editor, THE STATES AND SUBVERSION, Appendix A (Ithaca, 1952).
88. 20 Cal. 2d 536, 127 P. 2d 889 (1942).
89. 127 P. 2d 889, 895 (1942).

present thought to advocate objectionable doctrines. Such legislation has no rational basis. The change of a party name would satisfy the statute without altering the political doctrines at which the Legislature has aimed its restrictions . . . . Such a prohibition would destroy the rights of suffrage of those members of any party which affiliated itself with a foreign organization however beneficial the purposes of such an organization or however far removed from the field of political action within this country.[90]

A third provision prohibited participation by any party "which either directly or indirectly carries on, advocates, teaches, justifies, aids, or abets a program of sabotage, force and violence, sedition or treason against, the Government of the United States or this State." This provision the Court held constitutional.

> Such groups constitute an immediate threat to the functioning of our institutions, including the continued exercise of the right of suffrage. Since it is within the power of the state as to such groups to restrict even the rights of free speech and free press (. . . Whitney v. California . . .), it clearly was within the reasonable bounds of the Legislature's power to determine that these bodies should also be barred from the primary election ballot.[91]

The statute, however, provided that the Secretary of State of California should have authority to determine which parties came within the prohibition of this latter section. The Court held that such power in the hands of an administrative official was too liable of abuse. And the possible interference with so important a right as that of suffrage required opportunity for notice, hearing and judicial review.

An Arkansas statute similar to the third section of the California law was held constitutional in 1940 in *Field v. Hall*.[92] The Act was entitled "An Act to Bar Un-American Parties from the Election Ballot." Section 1 of the Act provided that:

> No political party shall be recognized and given a place on the ballot which advocates the overthrow by force or violence . . . of our local, State or national government . . . .

In addition it provided that no new party could be placed on the ballot until its officers had filed an affidavit stating that the party does not advocate overthrow of the government by violence and that

90. *Ibid.*, at 897-898.
91. *Ibid.*, at 898.
92. 201 Ark. 77, 143 S. W. 2d 567 (1940).

it is not affiliated with any group which does. The Secretary of State was given the power to determine whether an applicant party came within the statutory prohibition. The Arkansas Supreme Court held that Act constitutional. The Court felt that the remedy of mandamus was a sufficient safeguard for parties alleging unjust denial on the part of the Secretary of State. In a very brief opinion, it was stated that "We think the act is constitutional because it in no way abridges the civil right of suffrage and the right to the freedom of speech." The Court thought also that the legislatures of the various states "have authority to establish conditions precedent to the existence and operation of political parties."

The more recent type of restriction on access to the electoral process is the requirement that candidates for public office take an oath that they do not believe in overthrow of the government by violence. Gellhorn lists ten states which have such laws.[93] The Maryland Ober Act[94] provides that no person can become a candidate for public office unless he files an affidavit that he is not a "subversive person." Such a person is defined as any person who commits, attempts to commit, or teaches any person to commit, any act intended to overthrow the government by force or violence, or who is a member of an organization engaged in such conduct. In *Shub v. Simpson*,[95] the Maryland Court of Appeals held the Act invalid as applied to candidates for Federal office, but valid for candidates for state office. The United States Supreme Court was presented with the question of the constitutionality of this interpretation of the Ober Act in *Gerende v. Board of Supervisors*.[96] Gerende was denied a place on the ballot for failure to file the affidavit. In a *per curiam* opinion the Court said:

> The scope of the state law was passed on in *Shub v. Simpson* .... We read this decision to hold that to obtain a place on a Maryland ballot a candidate need only make oath that he is not a person who is engaged "in one way or another in the attempt to overthrow the government *by force or violence*," and that he is not knowingly a member of an organization engaged in such an attempt .... At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full

93. Walter Gellhorn, THE STATES AND SUBVERSION, Appendix A (Ithaca, 1952).
94. Md. Laws 1949, c. 86, § 15.
95. 76 A. 2d 332 (Md. 1950).
96. 341 U. S. 56 (1951).

> the statutory requirement. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is affirmed.

The State of Alabama went further and adopted a requirement that applicants for registration as voters must take a loyalty oath. In 1951 the proposed constitutional amendment passed the legislature,[97] and was adopted by the voters. It provided that applicants for registration take an oath disavowing belief in or affiliation at any time with any group or party which advocates overthrow of the government by unlawful means. Alabama is one of the few states in which advisory opinions may be obtained by the legislature from the state supreme court. In 1949, in such an advisory opinion on the proposed bill, the Alabama Supreme Court stated:

> . . . One who advocates the overthrow of the government by unlawful means cannot be held to embrace the duties and obligations of citizenship under the Constitution which provides for changes in governmental regulation by lawful means. The requirements do not seek to force one to believe in all the theories of our government, but his advocacy of changes must be by lawful means . . . . His oath required by the Amendment would not be conclusive that he embraces the duties and obligations of citizenship under the Constitution, but would be prima facie evidence of it. Of course inquiry would be open to the board of registrars to hear evidence which may conflict with that status.[98]

Presumably petition for mandamus would be the only method of getting a judicial hearing on the question of arbitrary exercise of authority by the registrar after the "inquiry" mentioned by the Court.

While restrictions on access to the electoral process against persons presently and actually teaching overthrow of the government by violence would appear to be constitutional, there is a question as to the wisdom of such policies. Americans are a resilient people, and so far such doctrines have not proved particularly viable in this country. The dangers of specific acts of espionage or sabotage are real and they are present. But they can be minimized by application of laws already present on the statute books without adding new laws which contain the greater possibility for damage to innocent people than for remedying the evils of subversion. The

97. ACTS OF ALABAMA 1950-51, No. 426.
98. 252 Ala. 351, 49 So. 2d 849, 855 (1949).

literal application of the Alabama provision would, for example, deprive a person of the franchise if he had belonged to the Communist party for six months in 1930 or 1920 or even farther back, no matter what his more recent sentiments. The depression of the 30's caused many Americans to affiliate with the more radical organizations in their desperate groping for solutions to our economic problems. And even if the applicant for registration has never been affiliated with the proscribed organizations, a doubt sowed in the mind of the registrar by some personal enemy would be the occasion for an inquiry. With the present state of associational jitters in the United States, the inquiry itself in the minds of many people brands the suspect as guilty even when given a clean bill of health.

Aside from the possible damage to innocent people, it is doubtful whether in a democratic country any group should be denied the ballot merely for what they believe. People who are denied the ballot are forced to use violence to gain their ends in government. And we cannot use the traditional justification for outlawing violent overthrow of the government — the available alternative of peaceful change through democratic processes. If groups are actively advocating overthrow of the government by violence, then they can be prosecuted under the sedition laws, and conviction will mean the loss of the franchise automatically.[99]

Another application of the loyalty oath is to prospective government employees. The leading case here is *Garner v. Board of Public Works*.[100] In 1941 the California legislature amended the Charter of the City of Los Angeles to prohibit employment by the City of any person who had, within five years prior to the Act, either taught overthrow of the government by violence or been a member of any organization which taught or advocated such action. In 1948, Los Angeles adopted legislation to effectuate its terms. The Los Angeles ordinance required the filing of an oath by all employees that they had not engaged in the prescribed activity, and an affidavit "stating whether or not he is or ever was a member of the Communist Party of the United States of America or of the Communist Political Association, and if he is or was such a member, stating the dates when he became, and the periods during which he was, such a member." Some of the petitioners took the oath but refused to execute the affidavit. The rest refused to do both. All were discharged. In contesting the dismissals petitioners contended that the ordinance

99. On access to electoral process see Note, 3 VAND. L. REV. 811 (1950).
100. 341 U. S. 716 (1951).

was a bill of attainder, an *ex post facto* law, and violated their freedom of speech and assembly. The California District Court of Appeal denied relief,[101] and the United States Supreme Court granted certiorari.

While the contention was that the oath and affidavit must stand or fall together, the majority of the Court did not agree. As to the affidavit, the opinion stated:

> We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry, and are not less relevant in public employment. The affidavit requirement is valid.[102]

With respect to the oath, the Court had more difficulty. While seven of the justices held the affidavit valid, only five thought the oath constitutional. Thus five held both valid, two held the affidavit valid but not the oath, and two held both invalid. The majority of five held that the oath was not *ex post facto* since the period of prohibited membership was 1943-1948, and the California statute was passed in 1941, thus giving advance warning of the qualification to be imposed. The majority took the view also that the oath requirement was merely a qualification for employment, and not a punishment within the meaning of a bill of attainder. The contention that the requirement was bad because an employee might have joined one of the proscribed organizations innocently was not accepted by the majority, because, they felt, it was to be assumed that only *knowingly* becoming affiliated with one of the organizations covered by the oath was the disqualifying membership.

Justices Frankfurter and Burton held the affidavit requirement valid but thought the oath requirement invalid. Justice Frankfurter's comments are particularly appropriate to the discussion of the right of association:

> The vice in this oath is that it is not limited to affiliation with organizations known at the time to have advocated overthrow of the government . . . . If this ordinance is sustained, sanction

101. 98 Cal. App. 2d 493, 220 P. 2d 958 (1950).
102. 341 U. S. 716, 720 (1951).

> is given to like oaths for every governmental unit in the United States. Not only does the oath make an irrational demand. It is bound to operate as a real deterrent to people contemplating even innocent associations. How can anyone be sure that an organization with which he affiliates will not at some time in the future be found by a State or National official to advocate overthrow of government by "unlawful means"? All but the hardiest may well hesitate to join organizations if they know that by such a proscription they will be permanently disqualified from public employment. These are considerations that cut deep into the traditions of our people. Gregariousness and friendliness are among the most characteristic of American attitudes
>
> . . . .
>
> The needs of security do not require such curbs on what may well be innocuous feelings and associations. Such curbs are indeed self-defeating. They are not merely unjustifiable restraints on individuals. They are not merely productive of an atmosphere of repression uncongenial to the spiritual vitality of a democratic society. The inhibitions which they engender are hostile to the best conditions for securing a high-minded and high-spirited public service.[103]

Justice Burton reached the same result as did Justice Frankfurter. Justices Douglas and Black thought the facts brought the case squarely under the rules of the *Cummings* and *Garland* cases[104] which held certain test oaths invalid as being bills of attainder and *ex post facto.*

In 1952 the Court rendered a decision in another public employment case, *Adler v. Board of Education of the City of New York.*[105] It was not a problem of the loyalty oath, but it did involve the question of public employment for subversives. The Feinberg Law, passed in 1949, provided that after an inquiry and some sort of notice and hearing the Board of Regents should prepare a list of subversive organizations. Then membership in any of these organizations should constitute prima facie evidence of disqualification for employment in the public schools. Both the listed organizations and any person in danger of being fired were to have a hearing and the right of judicial review. The action was for a declaratory judgment

103. 341 U. S. 716, 726-728 (1951). On the dangers of indiscriminate joining, see "If in Doubt, Don't Join," UNITED STATES NEWS AND WORLD REPORT, September 22, 1950, pp. 20-21.

104. Cummings v. Missouri, 4 Wall, 277 (1867); Ex parte Garland, 4 Wall, 333 (1867).

105. 342 U. S. 485 (1952).

to have the law declared unconstitutional. The Court heard the case on appeal from a decision by the New York Court of Appeals holding the law valid.

The majority of six justices upheld the Feinberg Law. Justice Minton, speaking for the majority, stated that persons have no right to work for the State in the school system on their own terms. If they do not choose to work for the school system upon the reasonable terms laid down by the proper authorities of New York, "they are at liberty to retain their beliefs and associations and go elsewhere." This may very well be true, but the question then hinges on what is a "reasonable term." He places the regulation in a category and then proceeds in his opinion to argue whether the category is justified. In justification for calling the regulation reasonable he states:

> That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate.[106]

The majority held that the case came within the *Garner* rule, and, as the quoted section indicates, gave official acceptance to the doctrine of guilt by association. Two aspects of the law and its application were held to remove any doubt of its constitutionality. First, the law, as construed by the New York court, required that the member of the organization must have known about its purpose. Second, there is the opportunity for a review of dismissal or denial of employment at which time the injured person can offer evidence to overcome the presumption of knowledge attached to membership.

Justice Douglas wrote a ringing dissent. His statement is better directed to the wisdom of the law than its constitutionality, but the latter question is covered nonetheless. He stated:

106. 342 U. S. 485, 493 (1952).

> I have not been able to accept the recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights. I cannot for example find in our constitutional scheme the power of a state to place its employees in the category of second-class citizens by denying them freedom of thought and expression. The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher . . . .
>
> The present law proceeds on a principle repugnant to our society — guilt by association. A teacher is disqualified because of her membership in an organization found to be "subversive" . . . . The irrebuttable charge that the organization is "subversive" therefore hangs as an ominous cloud over her own hearing. The mere fact of membership in the organization raises a prima facie case of her own guilt. She may, it is said, show her innocence. But innocence in this case turns on knowledge; and when the witch hunt is on, one who must rely on ignorance leans on a feeble reed . . . .
>
> Of course the school systems of the country need not become cells for Communist activities; and the classrooms need not become forums for propagandizing the Marxist creed. But the guilt of the teacher should turn on overt acts. So long as she is a law-abiding citizen, so long as her performance within the public school system meets professional standards, her private life, her political philosophy, her social creed should not be the cause of reprisals against her.[107]

In the same year, but in the next term of court, the Supreme Court had before it another loyalty oath, this time an Oklahoma requirement, in *Wieman v. Updegraff*.[108] But the provisions of the Oklahoma oath not even the more calloused members of the Court could stomach. The decision was unanimous in favor of holding the requirement invalid, with Justice Jackson taking no part in the case. The law, passed in 1950, required each state officer and employee, as a condition of his employment, to take a loyalty oath, stating, among other things, that he was not and had not been for the preceding five years a member of any organization listed by the Attorney General of the United States as "communist front" or "subversive." As construed by the Supreme Court of Oklahoma, it excluded persons from state employment solely on the basis of membership in

107. 342 U. S. 485, 508, 509, 511 (1952).
108. 344 U. S. 183 (1952).

such organizations, regardless of their knowledge concerning the activities and purposes of the organizations to which they had belonged. Appellants, members of the faculty and staff of the Oklahoma Agricultural and Mechanical College, failed to take the oath. Updegraff brought a taxpayer's suit to enjoin payment of further compensation to all who failed to take the oath. Over the contentions of appellants that the requirement was a bill of attainder, *ex post facto,* and violative of due process, the Oklahoma trial court upheld the law, and the state supreme court upheld this decision.[109]

Justice Clark delivered the opinion of the Court holding the oath requirement invalid. He noted that under the statute before the Court the fact of membership alone disqualified the state officer or employee. In objection to this he said:

> But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years, many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged . . . . At the time of affiliation, a group itself may be innocent, only later coming under the influence of those who would turn it toward illegitimate ends. Conversely, an organization formerly subversive and therefore designated as such may have subsequently freed itself from the influences which originally led to its listing.[110]

He distinguished the *Garner* and *Adler* cases on the ground that in those cases the disqualifying requirement was membership in the proscribed organizations and knowing their purposes. Apparently Justice Clark was anxious to modify the guilt by association doctrine accepted by the majority in the *Adler* case. He backpedaled on this point by saying:

> . . . (U)nder the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. We hold that the distinction observed between the case at bar and *Garner, Adler* and *Gerende* is decisive. Indiscriminate

109. Board of Regents v. Updegraff, 205 Okla. 301, 237 P. 2d 131 (1951).
110. 344 U. S. 183, 190 (1952).

> classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process.[111]

He also made a strategic withdrawal in the matter of giving the State free rein to establish qualifications for employment. He said that to draw from the language of the earlier cases "the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue." He further stated, "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

Justice Black concurred in the result, but on much broader grounds. He is opposed to test oaths *per se*. He stated:

> Test oaths are notorious tools of tyranny. When used to shackle the mind they are, or at least they should be, unspeakably odious to a free people . . . .
>
> Governments need and have ample power to punish treasonable acts. But it does not follow that they must have a further power to punish thought and speech as distinguished from acts. Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring, and silencing many more people than at first intended. We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven. And I cannot too often repeat my belief that the right to speak on matters of public concern must be wholly free or eventually be wholly lost.[112]

The state certainly has a right to prohibit the advocacy, whether in the public schools or out, of overthrow of the government by violence when there is danger of action ensuing from such advocacy. The difficulty with test oaths, registrations, and other peripheral prohibitions or restrictions against subversives, however, is that the effectiveness of such restrictions in stamping out subversion is probably very small, and the possibilities for damage to innocent persons are very large. At the very least Americans will become, indeed they have become, so cautious about joining associations that only those ultra-acceptable ones can recruit new members. And the contribu-

111. 344 U. S. 183, 191 (1952).
112. 344 U. S. 183, 193 (1952).

tions to a democratic society which arise from free association will be severely reduced if not lost.

KU KLUX KLAN

Conceived in the bitterness and prejudice of the Reconstruction period, the Ku Klux Klan has followed a cyclical pattern of persecution and dormancy. In periods of national stress the Klan stirs itself to safeguard the American way of life through floggings, threats and worse. While the avowed purposes of the organization are legal and perhaps legitimate, the methods employed are on many occasions illegal. Thus it is not a subversive organization in the sense that it advocates overthrow of the government by violence. It does, however, offer its services as a substitute for due process of law when it feels the occasion demands. There are several problems of effective punishment of those members who act illegally. First, the local law enforcement officers themselves are sometimes members or even officers of the Klan. In these cases, certainly, no punishment could be expected. Second, the victims of Klan attacks are often not the most desirable type of citizen, and public opinion does not become sufficiently aroused when the community itself disapproves of the victim. Third, the Klan members customarily have donned the white robes and hoods of their order prior to their soul-purging activities. Identification of the participants is then either difficult or impossible. And even when the victim might be able to identify the participants, fear of reprisals operates to dim his memory.

Since the avowed purposes of the organization are not illegal, the Klan as an organization has not been specifically outlawed. Membership in the Klan is not illegal, but several states have enacted laws designed to eliminate the danger of illegal activities of its members as Klansmen. The most common provision of this type is the anti-masking law. Gellhorn lists twelve states which as of January, 1951, had such laws.[113] Since that time Alabama and South Carolina have been added, and as of this writing a bill of this type is being considered by the legislature of North Carolina. The South Carolina Act,[114] passed in 1951, is interesting in that it not only prohibits masks and disguises, but also flaming crosses — another of the Klan trade-marks. Section 1 of the Act provides:

No person over sixteen years of age shall appear or enter

113. Walter Gellhorn, editor, THE STATES AND SUBVERSION, Appendix A (Ithaca, 1952).
114. *Acts* OF SOUTH CAROLINA, 1951, No. 99.

> upon any lane, walk, alley, street, road, public way, or highway of this State or upon the public property of the State or of any municipality or county in this State while wearing a mask or other device which conceals his identity; nor shall any such person demand entrance or admission to, or enter upon the premises or into the enclosure or house of any other person while wearing a mask or device which conceals his identity; nor shall any such person, while wearing a mask or device which conceals his identity, participate in any meeting or demonstration upon the private property of another unless he shall have first obtained the written permission of the owner and the occupant of such property.

Section 3 of the Act prohibits the placing of a burning cross, real or simulated, in a public place, and section 4 prohibits the placing of such crosses on any private property without the written permission of the owner or occupier of the premises. To date no reported cases deal with the validity of these laws, but it can safely be presumed that they meet the test of constitutionality, at least under the Federal Constitution.

Another type of regulation directed toward the Klan is the registration requirement. Such a requirement was before the United States Supreme Court in *New York ex rel. Bryant v. Zimmerman*.[115] The New York law, passed in 1923, provided that every oath-bound society with a membership of twenty or more persons should file with the Secretary of State a sworn copy of its constitution, rules and oath of membership, together with a list of officers and members. Labor unions and benevolent societies were excluded from the terms of the act. Membership in an organization included in the statute which had failed to comply with its terms was made a misdemeanor. Bryant was convicted under the act, and the main question before the Court in reviewing the conviction was whether the terms of the act violated equal protection of the laws, in that unions and other orders were not covered.

Justice Van Devanter delivered the opinion of the Court holding the act valid. He stated:

> The courts below . . . reached the conclusion that the classification was justified by a difference between the two classes of associations shown by experience, and that the difference consisted (a) in a manifest tendency on the part of one class to make

115. 278 U. S. 63 (1928).

> the secrecy surrounding its purposes and membership a cloak for acts and conduct inimical to personal rights and public welfare, and (b) in the absence of such a tendency on the part of the other class. In pointing out this difference one of the courts . . . said of the Ku Klux Klan, the principal association in the included Class: "It is a matter of common knowledge that this organization functions largely at night, its members disguised by hoods and gowns and doing things calculated to strike terror into the minds of the people," and later said of the other class: "These organizations and their purposes are well known, many of them having been in existence for many years. Many of them are oathbound and secret. But we hear of no complaints against them regarding violation of the peace or interfering with the rights of others."[116]

The Court then went into the evidence of the activities of the Klan. The opinion noted that membership was limited to native-born, gentile, protestant whites; that the organization espoused white supremacy and stimulated racial and religious prejudices; and that at times it was "taking into its own hands the punishment of what some of its members conceived to be crimes." On the basis of the evidence available, the opinion stated that, "We think it plain that the action of the courts below in holding that there was a real and substantial basis for the distinction made between the two sets of associations or orders was right and should not be disturbed."

These are examples of laws which indirectly get at the illegal activities of a particular type of association. They do not penalize membership, but if enforced, they make it more hazardous for the members to engage in illegal activities. This is the key difference between the desirable and the undesirable types of regulation. The former penalizes illegal activities, while the latter penalizes association itself.

To summarize the discussion of the right of association, then, one may say first that there is no specific statement of such a right in either the national Constitution or in any of the state constitutions. It is, however, a right cognate to those of free speech and free assembly. Associations have a place of particular importance in a democracy, whether they are associations of laborers, professional men, or electors and office-seekers. They serve as a training ground for group participation, organization and management of people and programs,

116. 278 U. S. 63, 75 (1928).

and for democratic acceptance of the majority will. They can also serve as a potential influence for improvement of communication between the individual and the government. Concerted demands for action by associations of people have a better chance for accomplishing the desired governmental action than do scattered individual requests. And the information furnished to administrators and legislators by private associations of various kinds is in many instances vital to the intelligent treatment of particular problems.

Some associations or interest groups go further than merely attempting to influence governmental policy and organize themselves into parties to capture offices and to determine policy. Many of our minor parties began as such interest groups. Even without these, however, there are the two major parties. And political parties are our most important associations. The right to organize parties and to nominate candidates is a matter of law. The major parties, and others which have strong followings, have not met any particular difficulties under the laws in nominating candidates and having such candidates entered on ballots. There are substantial requirements for numerical strength, however, which serve to discourage the smaller minor parties. The state provisions for the number of signers on petitions requesting a place on the ballots might profitably be amended to require less numerical strength. Certainly the expense involved in according a ballot position to every group of a dozen persons who call themselves a political party would be prohibitive. But minor parties should not be faced with insurmountable obstacles to existence. The importance of associations in a democratic society does not argue for complete absence of restrictions. Where the association engages in unlawful activities or is organized for an unlawful purpose, then it has no proper place in our society. The question, of course, is what activities or purposes are properly classed as unlawful? The history of labor organizations shows the development of an association from the status of a criminal conspiracy to that of an organization afforded positive recognition and protection under the law. And the Communist Party has undergone a reverse development, so that now, while the Party itself is not technically outlawed (except in some states), advocacy of its doctrines is illegal, membership in it is subject to various disabilities, and the Party has been denied a place on the ballot in many states.

Some associations, such as Murder Incorporated, are illegal in purpose and action, and are clearly entitled to no constitutional guarantee of existence. Others, such as the Ku Klux Klan, are

legal in their avowed purposes but often engage in illegal activities. Regulatory measures here have followed a logical pattern of getting at the illegal practices without outlawing the Klan, thus attempting to cure the disease without destroying the patient. Unhappily, this has not been true with respect to the so-called subversive organizations. The anti-subversive regulations have gone so far as to require in some cities deportation for any person who is seen talking to other persons in a non-public place who are at present or in the past have been Communists. This is the sort of shotgun legislation which endangers the whole institution of voluntary association. The Communist threat is a real and present danger, and it cannot be ignored. But neither can Americans afford to destroy the whole democratic society in order to root out one evil. The contributions made by exercise of the broad freedom to associate are too important to the proper operation of a democratic system to be seriously impaired by hasty, ill-considered measures.